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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF MARYLAND,

Petitioner,

v.

CRAIG W. MOON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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QUESTION PRESENTED FOR REVIEW

Whether admission of the business records of University Hospital containing the results of blood alcohol and osmolality tests administered to Respondent violated his Sixth Amendment right to confrontation when the technician who performed the test was available to testify, but was not called by the State prior to introduction of the record?

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OPINIONS OF THE COURTS BELOW

The opinions of the Court of Appeals and Court of Special Appeals of Maryland are reproduced in the appendix hereto.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals of Maryland was filed July 19, 1984. Jurisdiction of this Court is invoked

pursuant to 28 U.S.C. §1257(3) and Rules of the Supreme Court of the United States, Rule 17.1(b) and (c).

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Maryland Declaration of Rights, Article 21:

> "That in all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the Indictment, or charge, in due time (if required) to prepare for his defence; to be allowed counsel; to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses for and against him on oath; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty."

STATUTES

Annotated Code of Maryland, Courts and Judicial Proceedings Article, §10-101:

> "(a) Definition of 'business'. - 'Business' includes business, profession, and occupation of every kind.
>
> (b) Admissibility. - A writing or record made in the regular course of business as a memorandum or record of an act, transaction, occurrence, or event is admissible to prove the act, transaction, occurrence, or event.
>
> (c) Time of making records. - The practice of the business must be to make such written records of its acts at the time they are done or within a reasonable time afterwards.
>
> (d) Lack of knowledge of maker. - The lack of personal knowledge of the maker of the written notice may be shown to affect the weight of the evidence but not its admissibility."

STATEMENT OF THE CASE

Craig Wesley Moon, Respondent, was convicted of automobile manslaughter and related charges arising out of an accident in Carroll County, Maryland on February 18, 1979, at approximately 12:30 a.m. Two people, the driver and passenger in a southbound car, were killed in a collision with a northbound car driven by Respondent.

Mr. James Martin was also traveling northbound just prior to the accident. At a point 3.5 miles from the scene of the accident he saw Respondent's Toyota approach his vehicle from the rear at a high rate of speed. In the rearview mirror he observed the Toyota drive onto the right shoulder of the highway once and onto the left shoulder twice. One and six-tenths miles from the accident scene Respondent passed Mr. Martin's car and proceeded at an estimated 45 to 50 miles per hour. There were no eyewitnesses to the collision and no evidence of Respondent's speed at the time of the collision. An accident reconstruction expert testified for the State that impact occurred in the southbound lane. A defense expert opined that the cars collided in the northbound lane. There was no skidmark evidence to indicate that the driver of either vehicle applied the brakes just prior to the accident.

Mr. Martin arrived at the scene within two minutes of the impact. He leaned into Respondent's Toyota and detected a strong odor of alcohol. A similar observation was made by the next person to arrive, Maryland State Trooper Jack L. Hinkle, who attempted to render assistance to Respondent. Twenty minutes later a Maryland State Police helicopter

reached the scene. Medical attendant Kenneth Degen also detected the odor of alcohol on Respondent's breath during the twenty-minute flight to the Shock Trauma Unit of University Hospital.

Over defense objection the trial court received into evidence hospital records showing the results of a blood osmolality test (State's Exhibit 4B) and a blood alcohol test (State's Exhibit 4A). The osmolality reading was 347 and the blood alcohol concentration was determined to be 0.165%. The parties stipulated that the records in Respondent's hospital file were kept in the ordinary course of business, so that the testimony of the custodian of the records was not a prerequisite to their admissibility. The stipulation did not extend to the admissibility of the test results that are the subject of this appeal. The defense objection was based in part on the contention that Respondent had a constitutional right to confront and cross-examine the laboratory technician, Dennis Seabolt, who obtained the results. The State had subpoenaed Mr. Seabolt as a witness and he was present in court for trial. Because the trial court ruled that the right of confrontation did not require his testimony and

that the documents at issue were admissible under the statutory business records exception to the hearsay rule, Code (1974, 1980 Repl. Vol.) §10-101, Courts and Judicial Proceedings Article, the State did not call Mr. Seabolt to testify.

Dr. Yale H. Caplan, Chief Toxicologist of the State Medical Examiner's Office, testified as an expert witness for the State. He indicated he had a general familiarity with the blood testing procedures used at the University of Maryland Hospital, but he did not know the specifics of the procedures used to obtain the results at issue. Over defense objection he interpreted these results at considerable length. An osmolality reading of 347 was consistent with, though not a definitive determination of, an alcohol concentration of 0.15 or 0.16%. He further testified that an individual with an alcohol level of 0.165% may experience heightened self-confidence, decreased concentration, impaired vision, and increased reaction time.

At the conclusion of the bench trial on October 30, 1979 before Judge Luke K. Burns, Respondent was found guilty on eight counts, two of automobile manslaughter, two

of homicide by motor vehicle while intoxicated, driving while intoxicated, reckless driving, negligent driving, and failing to drive on the right half of the roadway. He was sentenced to concurrent terms of three years imprisonment on the manslaughter charges and one year for driving while intoxicated. The remaining charges merged. The court suspended all but one year of the imprisonment and placed Respondent on three years' probation upon release.

On direct appeal, Moon raised several issues, including violation of the Confrontation Clause. The Court of Special Appeals reversed the convictions, finding a violation of Maryland's implied consent law and did not address Moon's remaining contentions. After granting the State's petition for writ of certiorari, the Court of Appeals, however, reinstated the convictions, concluding that the statute was inapplicable under the facts of this case. That Court remanded the case to the Court of Special Appeals for consideration of issues not previously decided, including whether admission of the blood alcohol and osmolality tests violated Respondent's constitutional right to confrontation. This time, the Court of Special Appeals affirmed; however, upon Moon's petition for

writ of certiorari, the Court of Appeals of Maryland reversed and remanded the case for a new trial on the basis of a violation of Moon's constitutional right of confrontation. (App. 1)

ARGUMENT

ADMISSION OF THE HOSPITAL RECORD OF TEST RESULTS DID NOT VIOLATE MOON'S RIGHT TO CONFRONT THE WITNESSES AGAINST HIM.

This case, as did Ohio v. Roberts, 448 U.S. 56, 62 (1980), presents an opportunity for the Court "to consider once again the relationship between the Confrontation Clause and the hearsay rule with its many exceptions." Here, the business records exception, one of the most trustworthy of the hearsay exceptions, was found by a majority of the Maryland Court of Appeals not to satisfy the constitutional requirements absent a showing of unavailability of the declarant. Rather, Petitioner submits that the documents in issue here, and business records generally, satisfy the necessity and reliability requirements of the Confrontation Clause.

The hospital records were conceded by Respondent, and accepted by the Court of Appeals, to be admissible under the Maryland business records statute:

> "§10-101. Written Record.
>
> (a) Definition of 'business'. - 'Business' includes business, profession, and occupation of every kind.
>
> (b) Admissibility. - A writing or record made in the regular course of business as a memorandum or record of an act, transaction, occurrence, or event is admissible to prove the act, transaction, occurrence, or event.
>
> (c) Time of making records. - The practice of the business must be to make such written records of its acts at the time they are done or within a reasonable time afterwards.
>
> (d) Lack of knowledge of maker. - The lack of personal knowledge of the maker of the written notice may be shown to affect the weight of the evidence but not its admissibility."

As with all such statutes, the rationale for this exception to the hearsay rule is that the records satisfy the tests of "necessity and circumstantial guaranty of trustworthiness." Morrow v. State, 190 Md. 559, 59 A.2d 325 (1948); Smith v. Jones, 236 Md. 305, 309, 203 A.2d 865 (1964); Burroughs

International Company v. Datronics Engineers, Inc., 254 Md. 327, 347-48, 255 A.2d 341 (1969).

Despite this obviously correct concession (the alcohol tests were a part of Respondent's hospital record made in the ordinary course of the hospital's business of treating injured patients), the Court of Appeals of Maryland held that admission of the record prior to the testimony of the individual who made the entries violated Respondent's rights to confront witnesses under the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights.*

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* Mere mention of the Maryland constitutional provision does not constitute an adequate and independent state ground under Michigan v. Long, __ U.S. __, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201, 1214 (1983):

> "[W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so."

The opinion herein, filed more than a year after Long, fairly appears to rest primarily on federal law.

The majority opinion essentially held that:

> "Where the record of alcohol test results, on its face, gives rise to a question as to the reliability of the record and the tester is available and the defendant interposes a reasonable objection, testimony of the declarant is neither frivolous nor pointless. Rather, it is error not to require the declarant to testify before the record is admitted." ___ Md. at __, __ A.2d at __ (App. 26).

As pointed out by Judge Rodowsky in dissent, the majority opinion is legally incorrect and "needlessly brings into question the use in Maryland criminal cases of the most trustworthy exceptions to the hearsay rule." __ Md. at __, __ A.2d at __ (App. 32). He concludes:

> "As I see it, the fundamental error in the majority's rationale is the elevation of speculation above evidentiary fact and common experience. The majority uses the subjunctive mood to present its discussion of the untrustworthiness of Moon's University Hospital record. What Moon's counsel 'might' have asked is the sole concern. Under this analysis it is

> immaterial that the centuries of experience dating from adoption of the shop book rule make it most unlikely that the questions conjured by the majority would produce any answers evidencing a lack of trustworthiness in the hospital record. Thus, the standard for passing constitutional muster moves from the generally accepted reliability of the record to whether defense counsel 'might' want to ask some questions. Only such a Kafkaesque standard could convert the admission of reports on which life or death decisions are regularly based into a constitutional violation."(App. 51)

The majority's conclusion that the face of the record raised a question about its reliability and thereby violated the Confrontation Clause is both factually clearly erroneous and legally irrelevant to the question of admissibility. Any lack of clarity in the hospital record in this case went solely to its weight - a matter for the trial judge as factfinder.

Two documents are at issue. One, State's Exhibit 4A, the toxicology report, contained two dates: February 21, 1979 and February 18, 1979, 2:49 a.m. The current majority finds significance in this fact. The majority in the first Moon appeal dismissed it in a footnote, concluding that February 21st was the date when the results were written up and that

February 18th was when the tests were performed. (App. 68.) Furthermore, that document identified the Patient as "Male Doe 8515" and "65 54 44 049," but did not contain Moon's name. The other document, State's Exhibit 4B, the emergency room clinical laboratory report, contained the notations "M D 8515" and "65 54 44 049" as well as Moon's name. From these facts, the Court of Appeals' majority concluded that the reports were unreliable "on their face." If these observations suffice to render admission of an authenticated hospital record violative of the Confrontation Clause, then no hospital record is likely to pass muster in the eyes of the Maryland court.

Recently, In Ohio v. Roberts, supra, 448 U.S. at 65, n.7, the Court recognized that the rule of necessity aspect of the Confrontation Clause does not always require a showing of unavailability of the declarant, as when "the utility of trial confrontation is . . . remote . . . ." Furthermore, the business record exception was specifically mentioned as one of those which rest on "such solid foundations that admission of virtually any evidence within them comports with the

'substance of the constitutional protection.' Mattox v. United States, 156 U.S. [237], 244 [(1895)]." Ibid. at 66.

Its pedigree, even if not ancient, is nevertheless illustrious. Growing out of the common law "shopbook" custom of the 1600's, E. Cleary, McCormick on Evidence § 305 at pp. 717-18 (2d ed. 1972), the exception is now codified in statutes and rules of many jurisdictions. According to McCormick, both the common law and the codifications do not require any showing that the declarant is unavailable:

> "It appears, therefore, that under any statutory formulation or under present common law doctrines of admissibility the requirement of unavailability has for all practical purposes been abandoned. Apparent acceptance of inability to recall as satisfying the requirement, together with the common-sense recognition that in any of the situations likely to give rise to a business record the persons involved are unlikely to recall the details of specific transactions, means that proof that a record was made in the regular course of a routine activity constitutes a sufficient showing that calling the participants would be either unduly inconvenient or of no value." Ibid., § 311 at pp. 728-29.

Thus, the physical availability of the maker of an entry in a business record should be irrelevant to the admission of the record in evidence. The rationale for using business records in the first place is that the written record is probably more reliable than is the memory of its maker. The type of entry in question here certainly meets that description. The lab technician at a major metropolitan hospital cannot be expected to recall, months and years later, the specific results of tests run on blood and tissue samples of a particular accident victim. On the other hand, his contemporaneous recording of the results of those tests, upon which medical personnel made major treatment decisions, is highly trustworthy.

In like situations, other courts have properly evaluated the high reliability of business records and upheld their use as against confrontation clause objections. Again, Judge Rodowsky's dissent comprehensively sets out these authorities. (App. 38-43) In Howard v. United States, 473 A.2d 835 (D.C. App. 1984), written reports of the Drug Enforcement Agency were admitted under the applicable

District of Columbia business records statute. In finding no constitutional violation, the court considered their reliability:

> "[T]he reports contained objective facts rather than expressions of opinion. . . . [T]he chemists who conduct such analyses do so routinely and generally do not have an interest in the outcome of trials. In fact, as employees and scientists, they are under a duty to make accurate reports. It is difficult to perceive any motive or opportunity for the chemists to falsify." 473 A.2d at 839.

Here, the reports were not made by government chemists on items seized for criminal prosecution. Rather, a hospital technician performed routine tests for medical purposes. There is thus even less reason to fear a motive to falsify. Furthermore, the court in Howard noted that the defendant could challenge the reliability of the testing procedure or the qualifications of the chemist by subpoening the reporting chemist himself. So, too, Moon could have called the technician if the technician's current recollection could have shed any light on the import of the tests.

Similarly, in State v. Cosgrove, 181 Conn. 562, 436 A.2d 33 (Conn. 1980), the Supreme Court of Connecticut criticized judicial opinions which fail to accord routine

laboratory analyses the respect they are due and which needlessly burden trial process by requiring the State to produce the technicians. Particularly pertinent to the facts of this case, the Cosgrove court noted that the potential defense questions were not of the type that could only be asked on cross-examination of a State's witness:

> "We emphasize that both the questions raised by the district court and the Second Circuit panel in United States v. Oates, supra, [560 F.2d 45] could readily have been asked of the chemist if she had been the defendants' witness. While a defendant may be disadvantaged in certain contexts by the prosecutor's failure to call the extrajudicial declarant, see, e.g., Phillips v. Neil, 452 F.2d 337, 348 (6th Cir.); these disadvantages would seemingly be inconsequential in the present case because of the defendants' ability to call the chemist as their own witness. See, e.g., State v. Walker, 53 Ohio St.2d 192, 197, 374 N.E.2d 132. Moreover, it may well have been true that defendants' counsel, like Evans' counsel in Dutton v. Evans, supra, 400 U.S. 88 n. 19, 91 S.Ct. 219 n. 19, concluded that subpoenaing the extrajudicial declarant in this case would not have been in the best interest of their clients." (footnote omitted) 436 A.2d at 42.

The questions suggested concerned the chemist's personal qualifications and experience, whether the tests were correctly performed, the reliability of the tests, and the condition of the machines. Here, the questions suggested by the Court of Appeals go primarily to the type of test performed and the time of recording the results. Moon could just as well have elicited that information by calling Mr. Seabolt as his witness, as he could on cross-examination of a State's witness. It did not violate Mr. Moon's confrontation right to require that he, rather than the State, call the technician.

CONCLUSION

The Maryland Court of Appeals, in the guise of constitutional analysis, has eviscerated the business record exception for use in criminal trials. Its erroneous conclusion that, under the Sixth Amendment Confrontation Clause, a concededly authentic hospital record of objectively verifiable alcohol tests could not be admitted without first presenting an available technician is in conflict with decisions of this Court, other high state courts, and federal courts of appeals, and must be reversed. Petitioner prays that a writ of

certiorari issue to the Court of Appeals of Maryland to review the decision herein.

Respectfully submitted,

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